STATE OF MICHIGAN

IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

-vs-

ANTHONY JOHNSON,

Defendant-Appellee.
_____/

Supreme Court No.

Court of Appeals No. 246937

Lower Court No. 02-11051-01

WAYNE COUNTY PROSECUTOR

Attorney for Plaintiff-Appellant

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DEFENDANT-APPELLEE'S ANSWER TO PLAINTIFF-APPELLANT'S APPLICATION FOR LEAVE TO APPEAL

PROOF OF SERVICE

127434

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I. **DID THE COURT OF APPEALS CORRECTLY RULE THAT MR. JOHNSON WAS DENIED HIS CONSTITUTIONAL RIGHT TO PRESENT A DEFENSE IN LIGHT OF THE TRIAL COURT'S ERRONEOUS RULING ON THE APPLICATION OF PEOPLE V CORNELL?**

Court of Appeals answers, "Yes".
Plaintiff-Appellant answers, "No".
Defendant-Appellee answers, "Yes".

STATEMENT OF FACTS

Defendant-Appellant Anthony Johnson was convicted of first degree murder, MCL 750.316A; assault with a dangerous weapon, MCL 750.82; and possession of a firearm during the commission of a felony, MCL 750.227. Mr. Johnson was tried before a jury in Wayne County Circuit Court on December 12 and 13, 2002, the Honorable Daniel P. Ryan presiding. On January 8, 2003 Judge Ryan sentenced Mr. Johnson to concurrent sentences of life in prison without parole on the felony murder conviction (S 16, 17)[1], two to four years on the assault with intent to murder conviction and a two-year, consecutive sentence for the felony firearm conviction.

The charges against Mr. Johnson stemmed from a shooting that occurred at a bus stop early in the morning of August 13, 2002. The prosecution contended that Mr. Johnson did not like the victim, Freddie Bishop, and that Mr. Johnson shot and killed Mr. Bishop with a handgun that Mr. Johnson fired out of the front passenger seat of a gray Cadillac.

Mr. Johnson did not testify, and presented only one witness on his behalf. Mr. Johnson contended he was innocent and that the prosecution's evidence was insufficient to prove first-degree murder. The prosecution relied heavily on an inculpatory statement Mr. Johnson gave while in custody.

Before the trial, counsel for Mr. Johnson filed a motion to suppress all evidence relating to the gun as the result of an illegal search and seizure, in violation of the Fourth and Fourteenth Amendments to the United States Constitution. (EH 25).[2] He also made a motion to suppress evidence relating to the gun as violating the Fifth and Fourteenth Amendments to the Constitution, asserting the prosecution could not show a sufficient foundation linking the gun to

[1] The day of sentencing, January 8, 2003, will be referred to as S

the crime or to Mr. Johnson. (EH 55.) The trial judge heard testimony from Officer Brent Riccinto (which testimony was substantially similar to Officer Riccinto's trial testimony, which will be detailed later in this statement). After hearing the testimony, the trial judge denied both motions. (EH 59-62).

Around midnight on August 13, 2002, Freddie Bishop, James Robinson and Eugene Fisher were waiting at a bus stop near Seven Mile and Hayes in the City of Detroit. (T I, 77)[3]. Eugene Fisher testified that he had seen Mr. Johnson and Freddie Bishop quarrelling before. (T I 78). Mr. Fisher said that while he and the others were standing at the bus stop he saw three cars come around the corner. The last car slowed down, and he noticed there was a red dot on Freddie Bishop's shirt. (T I 80, 81). The red dot looked like a beam resting on the left side of Mr. Bishop's chest for a second or two. After Mr. Fisher saw the red dot on Freddie Bishop's shirt he heard what he thought were gunshots. Mr. Fisher thought the shots came from an assault rifle or a large handgun. (T I 81). After the first shot he saw Freddie begin to run and the glass at the bus stop shattered. (T I 81, 82). According to Mr. Fisher there were two people in the car, and the shots came from the passenger seat (T I 84). Mr. Fisher also stated on direct exam that he thought the gun was an automatic based on the way in which it was shooting, as there were sparks coming from the point of the gun where shells would be ejected, and that he heard between six and ten shots. (T I 85, 86).

After the shots were fired and the Cadillac drove off Mr. Fisher saw a small gash on the back of James Robinson's neck. (T I 89). He looked for but never found Freddie Bishop until an ambulance arrived on the scene. (T I 91).

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[2]See Appendix A.
[3] The second day of trial, December 13, 2002 will be referred to as T II.

Mr. Fisher also testified about Mr. Johnson's involvement with a group known as the "Gangster Disciples." (T I 94, 95). Mr. Fisher knew of some meetings between Mr. Johnson and Mr. Bishop that involved an argument, but never any fighting. Id. Mr. Fisher also stated that he saw Mr. Bishop with a gun in 1997. (T I 96).

On cross examination Mr. Fisher testified that he saw the red beam on the left side of Freddie Bishop's chest. At the preliminary hearing he testified that he was not exactly sure where the red beam was, but stated that he remembered it correctly when he testified on direct at trial. (T I 103). When asked about the gun he stated that it looked like an automatic and that he saw sparks coming from a point where they would on an automatic weapon. (T I 106-110). Mr. Fisher also testified that he thought the gun was black, but he was unable to articulate his reasons for this belief. (T I 110). Mr. Fisher never testified that he saw the shooter.

James Robinson testified he was standing at the bus stop when shots were fired. Mr. Robinson was standing in a triangle formation with Freddie Bishop and Eugene Fisher with Mr. Fisher standing closest to the street. (T I 126, 127). Mr. Robinson saw a red beam coming from the Cadillac before the shots were fired. (T I 127). He ran and fell to the ground after something hit him in the back of the neck, but he did not see the Cadillac leave because he was hiding behind a car. (T I 132). Mr. Robinson thought the gun was a semi-automatic. (T I 135). He told the police he thought there were at least ten shots fired. (T I 141).

On cross examination, Mr. Robinson admitted he did not know whether a bullet or a piece of glass hit him in the back of the neck (T I 148).

Two other witnesses were in the vicinity of the bus stop when Freddie Bishop was shot. Odell Warmsley was near the bus stop with his girlfriend, Dayna Owens. (T I 155). Mr. Warmsley was walking within twenty or twenty-five feet of the bus stop when he heard what he

thought were shots ring out. (T I 158). Three cars rounded the corner of the street on which the shooting occurred and the shots came from the third car, which was a gray Cadillac. (T I 159). Mr. Warmsley thought he heard about six or seven shots (T I 160-62). He thought that he saw three heads in the Cadillac. (T I 163).

Dayna Owens testified she was walking near the bus stop at Seven Mile and Hayes on August 13 with Odell Warmsley when she heard shots fired that sounded close together, as though they may have been fireworks. (T I 175). Ms. Owens could not tell how many people were in the car. (T I 176, 177).

Freddie McClodden, Mr. Bishop's father, went to the morgue on August 13, 2002 and identified his son's body. (T I 69). Later that night, at approximately four a.m., Mr. McClodden was sitting on the porch of his house, which is located about six houses down from the Johnson residence. (T I 72). Mr. McClodden saw a burgundy car pull up near the Johnson residence and heard three gunshots. (T I 73). The shots were fired, "maybe couple of seconds apart." (T I 73). The defense did not cross examine Mr. McClodden.

The prosecution called several Detroit Police officers who responded to the scene of the shooting, the scene of a firebombing at the Johnson residence later that night, and who interrogated Mr. Johnson after he was taken into custody. Officer Gregory Barrett and his partner, Officer James Forrest, responded to the scene of the shooting at Seven Mile and Hayes around midnight or one in the morning. (T I 231). When Officer Barrett arrived at the scene of the shooting he noticed a young black male lying on the ground. (T I 231). The young male was later identified as Mr. Bishop. Mr. Bishop was lying on the opposite corner from the bus stop in the driveway of an auto repair shop. (T I 231, 232). Officer Barrett admitted he thought it was unusual that Mr. Bishop's pants were down by his knees and his T-shirt looked as though

someone had folded it up. (T I 232). After calling EMS, Officer Barrett noticed the bus stop, located approximately 50 feet away, looked as though the glass was broken and he concluded that gunshots had been fired. (T I 234). While observing the scene and inspecting the area Officer Barrett did not find any shell casings on the ground. (T I 234).

Officer Barrett testified on cross examination that it looked as though Mr. Bishop had been searched. (T I 241). After the EMS arrived at Seven Mile and Hayes Officer Barrett and his partner searched the area around the scene and noticed gunshot holes at the bus stop. (T I 242). Officer Barrett and his partner searched a path approximately 30 feet wide, with flashlights, between a Coney Island and the location where the body was found. (T I 244, 245). The officers found no evidence of shell casings or other evidence of the shooting.

The prosecution also presented testimony about a firebombing that occurred early in the morning on August 13, 2002, at 15625 East State Fair in Detroit. Detroit Police Officer's Brett Riccinto and Roy Coleman responded to the firebombing around four a.m. and attempted to control the crowd. (T I 183, 184).

Officer Riccinto remained at the scene of the fire to secure the fire scene and in order to impound a vehicle located at the rear of the house. (T I 185). After referring to his preliminary complaint report Officer Riccinto testified that he was going to impound a 1986 Green Chevy, four-door vehicle because he suspected that it may have been involved in the shooting. (T I 186). The vehicle was located in the rear of the house, in the driveway. Officer Riccinto had been back in the driveway earlier in the night and was waiting for the car to be towed. (T I 186, 187).

Officer Riccinto was sitting in his scout car, waiting for the tow truck and filling out paperwork, when he observed a black male walk in front of the house and up the driveway. (T I

187, 188). Officer Riccinto exited his marked police car and watched the person walk up the driveway in order to see where the person was going. (T I 188). Officer Riccinto identified the person as J.B. Brown. Officer Riccinto lost sight of Mr. Brown for approximately thirty seconds, but after walking up the driveway he observed him crouched down at the corner of the garage. (T I 190). Officer Riccinto then walked up the rest of the driveway and detained Mr. Brown. (T I 190). When Officer Riccinto detained Mr. Brown there was a loaded .357 Magnum, nickel-plated revolver located within a foot of Mr. Brown, at the right corner of the garage. (T I 191). The gun contained a pressure sensitive laser and three live rounds. (T I 192, 193). Officer Riccinto testified that Mr. Johnson resides at the address of the firebombing. (T I 199).

On cross examination Officer Riccinto testified the gun he found was a silver revolver that is capable of holding six bullets, and that there were three live rounds and three spent shell casings in the gun. (T I 196). The bullets in the gun were fully-jacketed. (T I 199).

Detroit Police Officer Roy Coleman testified about what he observed when he responded to the firebombing at 15625 East State Fair on August 13, 2002. Officer Coleman testified he spoke with Anthony Johnson and other members of Mr. Johnson's family on August 13, 2002. (T I 258). When asked if Mr. Johnson saw anyone or was having problems with anyone, Mr. Johnson responded that he saw someone running westbound after the fire started and that he was having problems with Freddie Bishop. (T I 259, 260).

According to Officer Coleman, J.B. Brown, a relative of the Johnsons, was at the scene and was taken into custody by his partner, Officer Riccinto. (T I 262). Officer Coleman stayed at the scene until homicide detectives arrived at the scene. (T I 263).

On cross examination, Officer Coleman characterized the statement of the problems Mr. Johnson had with Freddie Bishop as an ongoing dispute between Mr. Johnson's friends and Freddie Bishop's friends. (T I 268).

No testimony was given at trial as to the circumstances surrounding Mr. Johnson's arrest. However, Mr. Johnson argued at a pretrial suppression hearing that his statement, taken by Investigator Simon, should be suppressed because it arose from an illegal arrest that was unsupported by probable cause. The prosecution argued that under a totality of the circumstances test the officers had no choice but to believe that Mr. Johnson was involved in the crime. (T 46, 47).

At the hearing Officer Anderson testified he responded to the scene of the shooting, and also went to the hospital on the morning of August 13, 2002 to meet with Eugene Fisher and James Robinson. (T 17, 18). Mr. Fisher never mentioned who he thought may have been involved in the shooting, but he did mention that a gang known as the G.D.'s or Gangster Disciples may have been involved. (T 20).

Later that morning, Officer Anderson went to the scene of the firebombing on East State Fair. (T 21). Several of the responding officers in the area gave Officer Anderson information about a young man who was being watched because of his possible prior altercations with Mr. Bishop. (T 21). The officers had some general knowledge about possible altercations between Mr. Bishop and this person, and the officers had some suspicions that someone associated with Mr. Bishop had set fire to the Johnson residence. (T 22). There was also testimony about a green Chevrolet in Mr. Johnson's driveway that had bullet holes in it and was suspected to be involved in the shooting. (T 22, 23).

Officer Anderson first came into contact with Mr. Johnson around five a.m. on August 13, 2002. (T 35 - 37). Mr. Johnson and J.B. Brown were in front of their house on East State Fair when Officer Anderson asked them about the shooting. (T 40 - 42). When asked where he had been that evening, Mr. Johnson denied involvement in the shooting. (T 24). Mr. Johnson stated that his girlfriend had dropped him off at his baby's mother's house that evening. (T 24). When Officer Anderson questioned Mr. Johnson's girlfriend she gave the officer a time that conflicted with that given by Mr. Johnson. (T 26). Officer Anderson then placed Mr. Johnson under arrest. (T 26).

On cross examination at the probable cause hearing Officer Anderson testified that when he spoke to Dayna Owens, Ms. Owens stated she saw "an older model Cadillac." (T 31). Officer Anderson also stated that Odell Warmsley saw shots coming from an older model Cadillac as well. (T 32). Officer Anderson did not know how he or the other officers reached the conclusion that the green Chevrolet in the backyard of the Johnson residence was involved in the shooting. (T 34, 35). Officer Anderson also stated that the officer at the scene of the fire, Officer Charles Flanagan, never said he had any information that Mr. Johnson was involved in the shooting. (T 39). There was an ongoing dispute between Mr. Johnson's and Freddie Bishop's groups, but Officer Anderson knew of no specific information linking Mr. Johnson to the shooting. (T 39 – 41).

Judge Ryan ruled that the officers did have probable cause to arrest Mr. Johnson. Judge Ryan relied on the testimony about the ongoing dispute between Mr. Johnson's group of friends and Mr. Bishop's group of friends, and the fact that Mr. Johnson's alibi was not completely corroborated, and ruled the statement could come in at trial. (T 50 – 52).

The last witness to testify for the prosecution, Detroit Police Investigator Barbara Simon, testified about a statement Mr. Johnson gave during the afternoon of August 13, 2002. Investigator Simon was the officer in charge of the case, and met with Mr. Johnson after he was arrested on August 13, 2002.

Investigator Simon advised Mr. Johnson of his Constitutional rights by having Mr. Johnson read and sign a constitutional rights form. (T II 9). Though Investigator Simon was aware that Mr. Johnson had given a prior statement denying involvement in Mr. Bishop's death to Officer Harris, Investigator Simon felt that she needed to ask Mr. Johnson more questions. (T II 10, 11). The interrogation took place in a small room in the homicide division at the police station. (T II 12 -15). Investigator Simon asked Mr. Johnson a series of questions over approximately a two hour period. Id. After establishing a rapport with Mr. Johnson Investigator Simon took a statement, in her own handwriting, from Mr. Johnson. (T II 12 - 15). The statement implicated Mr. Johnson in the shooting of Freddie Bishop. (T II 16).

When Investigator Simon asked Mr. Johnson what he could tell her about the shooting, Mr. Johnson spoke about several previous altercations between himself and Mr. Bishop, and stated that on August 12, 2002, he was driving around Seven Mile and Hayes with a friend and he noticed Mr. Bishop, pointed the gun out the window and started shooting. (T II 16, 17). Mr. Johnson stated that he had "A .357. It had a laser on it," and that he was unsure of how many times he fired the gun. (T II 17). When Investigator Simon asked Mr. Johnson if the statement he gave was true, he said "Yes. I just want to say that I'm sorry. I was just shooting. I didn't mean for anyone to get hurt." (T II 19).

On cross-examination Investigator Simon testified that she had reviewed Mr. Johnson's initial statement denying involvement in the shooting prior to questioning him. (T II 22, 23).

Mr. Johnson was locked in a small room prior to Investigator Simon's questioning and Investigator Simon took Mr. Johnson out of this room and into an interrogation room. (T II 25, 26). When Investigator Simon took Mr. Johnson into the interrogation room she intended to get Mr. Johnson to admit to the offense. (T II 29).

Investigator Simon then testified that she sat down with Mr. Johnson and advised him of his constitutional rights. (T II 39). Investigator Simon also testified about the specific technique she used on Mr. Johnson to secure his statement. (T II 39). Investigator Simon testified she built up a rapport with Mr. Johnson and that she did not threaten him. (T II 40 - 42).

The defense moved on to ask Investigator Simon questions about the length of time Investigator Simon spoke with Mr. Johnson. (T II 44 – 46). After refreshing Investigator Simon's recollection with testimony she gave at the preliminary hearing on August 29, 2002, Investigator Simon testified that she did not know exactly how long she spoke to Mr. Johnson and that she did not time it. (T II 45). In Investigator Simon's own words, she questioned Mr. Johnson for "quite a while" without leaving the interrogation room. (T II 45, 46).

The defense questioned Investigator Simon about whether she had questioned J.B. Brown. Investigator Simon testified she did question Mr. Brown and that she wrote down 1:04 p.m. on the constitutional rights form two times when it should have been 4:04 p.m. (T II 46, 47). Mr. Johnson's constitutional rights form, written at the beginning of the interrogation stated that the form was given at 12:30 p.m. (T II 49).

Investigator Simon testified that she made the mistake of writing 1:04 on Mr. Brown's constitutional rights form two times. After explaining that she had made a mistake several times when recording the time on the constitutional rights form Investigator Simon testified that she

did not perform and did not know of any gun powder residue tests being performed on Mr. Johnson. (T II 50 - 53).

On redirect, Investigator Simon stated that when there is a delay in the time of the offense and the arrest that sometimes gunshot residue tests are not performed. (T II 56). Investigator Simon also testified that at some point in the investigation Mr. Johnson began crying and said that this was stupid, senseless and he was sorry. (T II 59).

Dr. Paul Nora performed the autopsy on Freddie Bishop. Dr. Nora found a single gunshot wound to Mr. Bishop's left chest just below the nipple. (T I 206). Upon examination of the gunshot wound Dr. Nora noticed there was no exit wound and there was no stippling on the body, meaning the bullet was fired from greater than one foot away from Mr. Bishop. (T I 206, 209). Dr. Nora removed a large caliber, deformed, non-jacketed bullet from Mr. Bishop's body during the autopsy. (T I 211). Dr. Nora testified Mr. Bishop died of a single gunshot wound to the chest, and characterized the manner of death as a homicide. (T I 212).

On cross examination, Dr. Nora testified the bullet he removed from the body had no jacketing on it, and he found no jacketing in Mr. Bishop's body. (T I 215, 216). On redirect, Dr. Nora testified that, though he was not a ballistics expert, he noticed there was rifling on the bullet he removed from Mr. Bishop's body, meaning that there had never been a jacket on the bullet. (T I 219).

The prosecution called Officer Danny Reed and qualified him as a ballistics expert. (T I 221 - 223). Officer Reed examined both the bullet Dr. Nora removed from Mr. Bishop's body and the gun recovered from the rear of Mr. Johnson's home. (T I 223 - 225). After test firing the weapon, Officer Reed was unable to tell whether the bullet found in Mr. Bishop's body had been fired from the gun recovered near Mr. Johnson's home. (T I 225, 226). The bullet Dr. Nora

removed from Mr. Bishop's body was the same caliber as the seized gun. (T I 226). The gun had a laser sight attached to it. (T I 227, 228). On cross examination Officer Reed testified the bullet recovered from Mr. Bishop's body was a non-jacketed bullet. (T I 229).

The defense made a motion for a directed verdict after the testimony of Officer Simon. (T II 62). The defense argued that even when viewing all the evidence in a light most favorable to the prosecution the only evidence linking Mr. Johnson to the crime was a statement that did not show the necessary premeditation and deliberation for first degree murder. (T II 62). The defense made the same argument with respect to the assault to commit murder charge. (T II 62). Judge Ryan denied the motion for a directed verdict. (T II 65).

After the prosecution rested Judge Ryan ruled that Mr. Johnson could not offer an alibi defense and also have the jury instructed on lesser included offenses, even though Mr. Johnson had filed a timely notice of alibi on November 26, 2002. (T II 68 – 70). Prior to this ruling, there was a brief side bar discussion after which Judge Ryan offered into the record the content of the discussion. (T II 65 - 67). Defense counsel asked that the jury be instructed on involuntary manslaughter and the intentional aiming of a firearm. (T II 65). The prosecutor objected to these instructions. Judge Ryan stated that if the defense offered an alibi defense the only lesser included offense he would be able to give under People v Cornell would be second degree murder. (T II 66). Judge Ryan stated that if the defense presented an alibi defense the jury could only find guilty or not guilty as charged because to give lesser included offenses would be inconsistent with the defense theory. (T II 66, 67). Judge Ryan also noted the defense counsel argued, and there was evidence on the record to support the claim, that Mr. Johnson only intentionally aimed the firearm. (T II 67).

Judge Ryan specifically said the defendant could not offer evidence that Mr. Johnson was not there and still let the jury consider lesser offenses. (T II 68). The defense argued the lesser included offense instructions should not depend on what defense Mr. Johnson presented to the jury, and if the jury disregarded the alibi defense, they could still find, under the facts of this case, that Mr. Johnson was only guilty on a lesser included offense. (T II 68, 69). Judge Ryan again stated that an alibi defense "shut a whole bunch of doors" under People v Cornell. (T II 70).

After considering Judge Ryan's ruling the defense chose to not present the alibi defense, and instead chose to receive the lesser included instructions. (T II 77, 78).

Following Judge Ryan's ruling the defense called Officer Danny Reed. Officer Reed testified about the differences between a semi-automatic weapon and a revolver. (T II 81 - 85). The gun admitted into evidence in this case was a revolver that held six rounds. (T II 82). Semi-automatic weapons eject a shell when fired and generally can be fired more rapidly than revolvers. (T II 82 - 84).

On cross examination Officer Reed testified that semi-automatic weapons usually fire 45 caliber bullets and revolvers primarily fire .357 caliber bullets. (T II 86). Officer Reed also testified he had never seen a semi-automatic revolver that fired .357 caliber bullets. (T II 86, 87). On redirect, Officer Reed testified he knew that automatic weapons that fired .357 bullets did in fact exist. (T II 87).

The defense rested and both sides made closing arguments. Following closing arguments Judge Ryan instructed the jury. Consistent with his prior ruling, Judge Ryan gave no alibi instructions, and the jury was able to consider involuntary manslaughter as a lesser included

offense and great bodily harm less than murder and felonious assault with regard to the assault charges. (T II 135-41).

The jury retired for deliberations on Friday, December 13, 2002. During deliberations the jury asked to see the gun and the laser sight and asked for a copy of the confession. (T III 3, 4).[4] The jury returned a verdict of guilty of first degree murder, assault with intent to commit murder and felony firearm on Monday, December 16, 2002. (T III 6-9).

On January 8, 2003 Judge Ryan sentenced Mr. Johnson to concurrent sentences of life in prison without parole on the felony murder conviction (S 16, 17), two to four years on the assault with intent to murder conviction and a two-year, consecutive sentence for the felony firearm conviction.

On October 14, 2004, the Court of Appeals issued its decision on Mr. Johnson's appeal of right, reversing the convictions and remanding the matter to the trial court for a retrial.

[4] The day the verdict was announced will be referred to as T III.

I. THE COURT OF APPEALS CORRECTLY RULED THAT MR. JOHNSON WAS DENIED HIS CONSTITUTIONAL RIGHT TO PRESENT A DEFENSE IN LIGHT OF THE TRIAL COURT'S ERRONEOUS RULING ON THE APPLICATION OF PEOPLE V CORNELL.

ISSUE PRESERVATION AND STANDARD OF REVIEW

The standard of review for a claim that the trial court denied a defendant his right to present a defense is de novo. People v Kurr, 253 Mich App 317 (2002) (citing US Const, Amend 6; Const 1963, art 1, § 13). This issue was preserved by Mr. Johnson's request for and Judge Ryan' denial of his right to both raise an alibi defense and have the jury instructed on lesser included offenses. (T II, 65 - 68). The issue implicates Mr. Johnson's rights to due process of law and to a fair trial.

ARGUMENT

The trial court committed reversible error by forcing Mr. Johnson to choose between either presenting an alibi defense or charging the jury with lesser included offenses to the first degree murder and assault charges. The trial judge erroneously relied on People v Cornell, 466 Mich 335 (2002), for the proposition that Mr. Johnson was not allowed to both present an alibi defense and have the jury charged with lesser included offense instructions. Based on Judge Ryan's ruling, Mr. Johnson presented no witnesses nor elicited any testimony regarding his alibi defense. In denying Mr. Johnson's motion to submit both the alibi defense and the lesser included offenses to the jury the trial court denied Mr. Johnson his constitutional right to a fair trial and to raise a defense.

The right to put on a defense is fundamental to due process. In re Oliver, 333 US 257; 68 S Ct 499; 92 L Ed 682 (1948). The due process right to present a defense under US Const,

Amends V, XIV; Const 1963, art 1, §§ 17, 20, includes the right to have the judge properly instruct the jury on the defense. Washington v Texas, 388 US 14, 19; 87 S Ct 1920; 18 L Ed 2d (1967). In Washington, the Court noted:

> The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law.

In a recent decision, this Court held the statute providing that the jury "may find the accused person guilty of a degree of [the] offense inferior to that charged in the indictment" permits consideration only of necessarily included lesser offenses, but not cognate lesser offenses. Cornell, 466 Mich 335 (citing MCL § 768.32(1)). A requested instruction on a necessarily included lesser offense is proper if the charged greater offense requires the jury to find a disputed factual element that is not part of the lesser included offense and a rational view of the evidence would support the instruction. Id at 358.

The Court in Cornell did not, however, discuss lesser included offenses in the context of raising other defenses. The Court simply held the jury should be instructed on lesser included offenses where a rational view of the evidence would support such an instruction. Id. In Cornell, the Court held an instruction on misdemeanor breaking and entering was warranted where the defendant was charged with felony breaking and entering with intent to commit larceny because there was a factual dispute at trial differentiating the greater offense from the lesser included offense. Id at 360. The Court found that error was harmless because the evidence presented did not clearly support a conviction of the lesser included offense. Id at 366.

In Cornell, supra, there was no issue raised concerning alibi defenses, nor the propriety of presenting an alibi defense in conjunction with also instructing the jury on lesser included offenses. The trial court in the case at bar erroneously relied on Cornell for a proposition that Mr. Johnson could not both present raise an alibi defense and also have the jury instructed on

lesser included offenses to the first degree murder charge. Specifically, the trial court stated: "The defense can't ... have their cake and eat it too. You cannot offer evidence that [Mr. Johnson] wasn't there and then say, let them consider this over the prosecution's objections." (T II 68). This ruling was not only a mistaken interpretation of Cornell, but the court's ruling denied Mr. Johnson his right to put on a defense in violation of the United States Constitution.

Under Cornell, Mr. Johnson was entitled to have the jury instructed on the lesser included offenses because a rational juror could have found that the evidence presented supported only the lesser included offenses. This fact was clearly established when Judge Ryan admitted "there's evidence to support that," meaning there was evidence to support Mr. Johnson's claim that the prosecution's evidence only showed the shooter intended to aim the firearm, and the prosecution did not establish the necessary state of mind for guilt on first degree murder. (T II 67). Judge Ryan correctly recognized a rational juror could believe the evidence supported the lesser included offenses when he stated that "he intentionally aimed a firearm. There's evidence to support that." (T II 74). There was no issue raised in Defendant's appeal on whether the trial court decision to instruct on the lesser offenses was correct.

A case decided by this Court after Cornell held that manslaughter and involuntary manslaughter are permissible lesser included offenses in murder cases. See People v Mendoza, 468 Mich 527, 548 (2003). The Court, in Mendoza, affirmed the principle that a lesser included offense instruction is warranted where a rational view of the evidence would support it. However, there is also no language or suggestion in Mendoza that would preclude the presentation of alibi witnesses where lesser included offense instructions are given. Despite Judge Ryan's thinking to the contrary, this Court did not hold in either of these cases that an alibi defense precludes a defendant from having the jury instructed on lesser included offenses, or vice versa.

Michigan courts have held that the presentation of an alibi defense does **not** deprive a defendant of the right, where otherwise appropriate, to also have the jury instructed on lesser included offenses. See People v Bryant, 80 Mich App 428, 432 (1978). In Bryant, the Court of Appeals noted that "a defense of alibi, per se, does not mean that a defendant may not be convicted of a lesser offense. A jury may disbelieve a defendant's alibi but nevertheless find that a disputed element of the principal charge was not proven." Id (quoting People v Membres, 34 Mich App 224, 232 (1971)). The Court also stated that "the assertion of an alibi defense does not deprive a defendant of his right to instruction on appropriate lesser included offenses." Bryant, at 432.

The Bryant decision is factually distinguishable from Mr. Johnson's case, as there an alibi was presented, but the jury was not instructed on any lesser included offenses as the trial court held the alibi acted as a waiver of any right to have lesser offenses given to the jury. The jury in Bryant specifically asked if they could find the defendant guilty on a lesser offense, but that request was denied by the trial judge. The Court of Appeals in Bryant held it was reversible error to not give the jury the option of the lesser offenses, even with the existence of the alibi testimony. Bryant, at 432 – 434.

Mr. Johnson's case is even stronger than that of Bryant, as Judge Ryan here acknowledged there was evidence to support the lesser included offenses. (T II 67). However, as did the trial judge in Bryant, the judge here erroneously concluded the defense could not both present an alibi defense and also argue the prosecution had not presented sufficient evidence showing that the charged offense had been committed. Under Bryant, Judge Ryan should have allowed Mr. Johnson to present his alibi defense, and also attack the sufficiency of the prosecution's evidence.

Michigan courts recognize the principle that defendants are allowed to present inconsistent defenses. See People v Hansma, 84 Mich App 138, 142 (1978) (citing People v Williams, 26 Mich App 218, 222 (1970)). In an analogous case, a Michigan court held a defendant was allowed to raise both a noninvolvement defense and an intoxication defense. People v McLean, 52 Mich App 182, 185, 186 (1974). In another analogous case, the Michigan Court of Appeals held the trial court's refusal to give a defense of others instruction prejudiced the defendant where the evidence at trial supported such a claim. Kurr, 253 Mich App 317, 327.

Mr. Johnson's situation necessarily presents an even stronger case for reversal as he was, in effect, not allowed to present any evidence of his alibi defense. Mr. Johnson was seeking to both raise an alibi defense and concurrently attack the sufficiency of the prosecution's evidence as to what crime was committed, regardless of the identity of the offender. Based on the trial court's ruling, when given the choice, Mr. Johnson chose to accept the lesser included instructions, excuse the alibi witnesses [5]and thereby, closed the door on his opportunity to raise an alibi defense. This choice that Mr. Johnson faced was not a matter of defense strategy. Mr. Johnson was required to make a choice solely due to Judge Ryan's erroneous ruling. The very act of having to choose between putting on a defense and getting lesser included instructions put Mr. Johnson in an unconstitutional dilemma.

The prosecution argued it was inconsistent for Mr. Johnson to argue both that he was not there and that the evidence only supported a conviction of the lesser included offenses. This was not correct. It was plausible for Mr. Johnson to both present an alibi defense and to attack the sufficiency of the prosecution's evidence. Mr. Johnson did not attempt to raise inconsistent defenses. Rather, he attempted to argue that he was not there, and that the prosecution only

presented evidence that would support involuntary manslaughter and the intentional aiming of a firearm. It was correct under Michigan law for Mr. Johnson to make both these arguments.

Judge Ryan's refusal to allow Mr. Johnson to both present an alibi defense and attack the prosecution's evidence denied him the right to present a defense. Kurr, 253 Mich App 317. Judge Ryan's ruling severely prejudiced Mr. Johnson as he was unable to present any evidence of his alibi defense. Had the jury been able to hear this information, and been properly instructed on the alibi defense, they could have considered Mr. Johnson's alibi to raise a reasonable doubt as to his involvement in the offense, and found him not guilty of all charges.

The Court of Appeals below correctly recognized that Judge Ryan misconstrued and misapplied this Court's opinion in Cornell, and that Mr. Johnson had the right to present alibi evidence, and have the jury instructed as to alibi, in addition to having the jury instructed on lesser included offenses. The Court also correctly recognized that the trial judge had ample factual support for the ruling that the trial evidence supported the defense request, under Cornell, for an instruction on involuntary manslaughter under a theory of an intentional firing of a weapon causing death. That evidence, which was presented by the prosecution in their case-in-chief, included the alleged inculpatory statement made by Mr. Johnson[6] that while he may have fired shots in the direction of the men at the bus stop, he had not intended to hit any of the men and was sorry that anyone had been injured. That evidence presented a clear factual dispute as to which crime occurred, regardless of the identity of the offender, sufficient to support an instruction on manslaughter under the Cornell rule.

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[5] Mr. Johnson had properly preserved his right to present alibi testimony by timely filing a pre-trial notice of an intent to present an alibi, as required under MCL 768.20. See lower court docket entries.

[6] At trial the defense challenged the admissibility of this statement, and severely attacked its veracity and reliability.

In their application to this Court, the prosecution does not argue that Judge Ryan correctly applied Cornell, or even that it is impermissible for a defendant to both present an alibi defense and also get instructions on lesser offenses. Instead, the prosecution asserts that Judge Ryan was incorrect to hold that the record supported an instruction on manslaughter, and, therefore, that the defense was not prejudiced by the choice Judge Ryan placed on the defense. However, all four judges that have now reviewed the record have agreed, as detailed above, that the evidence in the case presented a factual question as to which offense occurred sufficient to permit the jury to decide whether the killing was a murder or a manslaughter. While the prosecutor at trial did object to the court's ruling that a manslaughter instruction was supported, there was no attempt by the prosecution to raise an interlocutory appeal of that decision, even after the defense opted to forego the alibi evidence in favor of the included offense instruction. The record fully supports the trial judge's decision, and the unanimous agreement of the Court of Appeals' panel with that decision, that a manslaughter instruction was appropriate on this record.[7]

The prosecution further asserts that Mr. Johnson was not sufficiently prejudiced by the absence of an alibi instruction after his trial counsel opted for the manslaughter instruction rather than presenting the alibi defense. The prosecution fails to appreciate the real prejudice in the case. Mr. Johnson's case was not damaged so much by the absence of an alibi instruction as it was by the total absence of any testimony from alibi witnesses or any other evidence in support of an alibi defense. While clearly an instruction on alibi would have been required had such

[7] The prosecution's application discusses the evidence in the case that supported the charged offense of premeditated murder. There was no claim made by the defense on appeal, and none made to this Court, that the evidence was legally insufficient to present the first-degree murder charge to the jury. The only claim made, at trial and now, is that there was sufficient contrary evidence that the shooting may have been unintended to support a verdict of manslaughter as an included offense.

evidence been presented, even though the jury would still have been instructed, as the prosecution points out, that the prosecution had to prove beyond a reasonable doubt that the accused committed the crime, the constitutional violation in this case was **not** the denial of an instruction on alibi, but rather the effective denial of the right to present the defense **evidence** due to Judge Ryan's erroneous application of Cornell. That misapplication of the precedent placed the defense in an unconstitutional dilemma of which defense theory to abandon in order to retain the other. It does not matter which choice the defense ultimately made – the error was in forcing the choice at all. The Court of Appeals rightly found that Michigan law, including Cornell and Mendoza, permits a defendant to raised separate defenses as long as each is supported by the record. In the case at bar, the trial judge found, with justification, that both defense theories would be supported by the record (assuming the alibi witnesses would testify consistent with the pre-trial notice), but improperly limited the defense to one or the other of these theories. That ruling violated Mr. Johnson's constitutional right to present his defenses, and that error was not, as recognized by the Court of Appeals, harmless beyond a reasonable doubt.

Judge Ryan committed reversible error in improperly finding that the opinion in Cornell required the defense to pick between presenting an alibi or getting jury instructions on lesser offenses. This Court should affirm the Court of Appeals' decision to reverse Mr. Johnson's conviction and remand the case for a new trial where Mr. Johnson can present his alibi defense to a properly informed and instructed jury.

SUMMARY AND RELIEF

WHEREFORE, for the foregoing reasons, Defendant-Appellee asks that this Honorable Court deny Plaintiff-Appellant's Application for Leave to Appeal. In the alternative, if the application is granted, or the decision overturned, the matter should be remanded to the Court of Appeals for full consideration of the other issues raised in Defendant's appeal of right, which issues were not resolved by the Court of Appeals.

Respectfully submitted,

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BY: _____

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Dated: December 1, 2004.

STATE OF MICHIGAN

IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

-vs-

ANTHONY JOHNSON,

Defendant-Appellee.
_____/

Supreme Court No.

Court of Appeals No. 246937

Lower Court No. 02-11051-01

PROOF OF SERVICE

STATE OF MICHIGAN)
) ss.
COUNTY OF WAYNE)

PETER JON VAN HOEK, being first sworn, says that on December 1, 2004, he mailed one copy of DEFENDANT-APPELLEE'S ANSWER TO PLAINTIFF-APPELLANT'S APPLICATION FOR LEAVE TO APPEAL, and PROOF OF SERVICE, to:

WAYNE COUNTY PROSECUTOR
Appellate Division
1100 Frank Murphy Hall of Justice
1441 St Antoine
Detroit, MI 48226

Peter Jon Van Hoek
PETER JON VAN HOEK

Subscribed and sworn to before me
December 1, 2004.

Jacqueline C Nickels
Jacqueline Nickels
Notary Public, Wayne County, Michigan
My commission expires: 10/24/07
19889T-J/Peter Jon Van Hoek